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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Policies and Rules Regarding )  
Minority and Female Ownership )  
of Mass Media Facilities )  
 )

MM Docket Nos. 94-149  
and 91-140

TO: The Commission

COMMENTS OF PRESS BROADCASTING COMPANY, INC.

1. Press Broadcasting Company, Inc. ("Press") hereby submits its Comments in response to the Notice of Proposed Rule Making ("NPRM"), FCC 94-323, released January 12, 1995 in the above-captioned proceeding. As set forth below, Press urges that the Commission act with extreme caution and sensitivity in considering the establishment of new (or modified) race-based and gender-based policies.

2. As an initial matter, Press emphasizes that it fully supports the goal of equal opportunity regardless of race or sex. Discrimination based on race, ethnicity, religion, or other such irrelevant grounds is plainly unacceptable. Individuals should be considered on the basis of their own unique qualifications, not on the basis of impermissible racial or ethnic stereotypes.

3. Having said that, though, Press questions the basic premise of this proceeding. It appears that the proposal to promote minority and female broadcast ownership is based on the notion that there is an "underrepresentation" of such groups in broadcast ownership and that it is therefore incumbent on the

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government to correct that "underrepresentation". NPRM at ¶¶5-6. That is, the proposal does not appear designed to address or redress any history of unlawful discrimination against such groups in the issuance of broadcast licenses, or any other particular unlawful discrimination which might be said to underlie the racial/sexual composition of broadcast ownership.

4. But absent some such unlawful discrimination underlying the industry's present ownership profile, it is not at all clear why the Commission should feel that governmental intervention to reshape that profile is either necessary or appropriate. Press is not aware of any other government programs intended to reshape the ownership of (or participation in) whole industries just because those industries' current profiles do not happen to meet some definition of supposedly adequate ethnic or sexual "representation".<sup>1/</sup> For example, the number of blacks on the rosters of professional hockey teams certainly falls short of their prevalence in the general population; does that "underrepresentation" justify race-based governmental policies

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<sup>1/</sup> On this point, the Commission's own proposal is less than clear as to the particulars of the "underrepresentation" claim. The Commission offers overall population statistics reflecting that "minorities comprise approximately 20 percent of the national population" and "23 percent of the national workforce", and that women represent "almost 46% of the civilian labor force in the United States". NPRM at ¶6. But there is no demonstration that minorities and/or women have sought to involve themselves in the broadcast industry -- either as owners or employees -- in direct proportion to their presence in the overall population or workforce. Absent some such demonstration, reliance on general population or workforce statistics is hardly compelling.

designed to promote some greater "representation"? <sup>2/</sup>

5. While it is true that diversity of media voices has long been a fundamental tenet of the Commission's regulatory mission, that tenet has not, as far as Press is aware, authorized the Commission to attempt to promote any particular voices over others (even if other constraints -- the First Amendment, for example -- might have countenanced such promotion). Rather, the goal has been simply to assure a general diversity of voices. It is therefore odd that the Commission should seek to promote the "representation" of some supposedly distinct voices over others. This is especially so since there is no legitimate basis, as far as Press is aware, from which it might be concluded that any individual minority or female licensee would, simply by virtue of his or her race, ethnicity or sex, be more likely to provide a

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<sup>2/</sup> The professional sports analogy is by no means inapt here. Another example of arguable "underrepresentation" involves major league baseball. While substantial numbers of black and Hispanic players are on current rosters, there appears to be only one Asian player. In view of the fact that baseball is played (on both professional and non-professional levels) in a number of Asian countries, and in view of the fact that, historically, Asian teams have often dominated U.S. teams in Little League competition, it is difficult to say that the non-representation of Asians in major league baseball is the result of a lack of interest or competitive skills. And yet, no affirmative governmental programs exist (to the best of Press' knowledge) designed to promote Asian entry into major league rosters.

Of course, the notion of "representativeness" as defined, apparently, by comparison to general population statistics poses some difficulties in other sports -- for example, professional basketball or certain segments of the entertainment industry -- where non-minority (i.e., white) participants seem to comprise less than a majority. Where such disparities exist, should the government seek to promote the "representation" of non-minority players in the interest of "representativeness"?

distinct "voice". After all, racial, ethnic and sexual stereotyping -- i.e., the assumption that one's race, ethnicity or sex will automatically determine who that person is, what that person thinks, how that person acts, or, more importantly, how that person will supposedly program a broadcast station -- is the very core of racism and sexism. As the Appellants in Brown v. Board of Education, 347 U.S. 483 (1954), led by Thurgood Marshall, persuasively argued to the Court,

[governmental classifications] based upon race and color alone . . . [are] patently the epitome of that arbitrariness and capriciousness constitutionally impermissible under our system of government. A racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or racial friction.

Appellants' Brief in Brown, filed September 23, 1952, at 6-7 (citations omitted). <sup>3/</sup>

6. Further, the notion of "underrepresentation" suggests

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<sup>3/</sup> A related concern undermines the Commission's alternative "economic rationale" for its proposals. According to that "economic rationale", race- and sex-based governmental programs are necessary because "women and minorities face economic disadvantages when they attempt to enter the mass media industry". NPRM at ¶8. But the Commission nowhere offers any support for that premise, much less any support for the essential underlying assumption that, even if women and minorities do "face economic disadvantages", those disadvantages are solely the result of their race, sex or ethnicity. It is, after all, very possible (if not extremely likely) that any such "economic disadvantages" are purely economic in origin, and that they adversely affect minorities and non-minorities, women and men alike. If that very logical possibility is the case -- and the Commission has offered no evidence to the contrary -- then resort to constitutionally questionable race-based and gender-based policies is unnecessary. Instead, the Commission should seek mechanisms which address economic factors irrespective of race or sex.

that, at some point, a level of appropriate "representativeness" might be reached which will obviate incentive programs.<sup>4/</sup> But that, in turn, suggests that the Commission is prepared to adopt a quota system: until certain levels of minority and female ownership are reached, there will (in the Commission's apparent view) continue to be "underrepresentation" and, therefore, a need for race-based and sex-based programs. If that is in fact what the Commission has in mind, it should articulate clearly what levels of minority and female ownership must be attained.

7. In approaching that task -- and, indeed, in undertaking any race-based program along the lines proposed in the NPRM -- the Commission must be clear in its underlying definitions. Most importantly, at a bare minimum the Commission should provide clear definitions of the distinctions which qualify applicants for "minority" status. Unfortunately, the Commission's overall approach to minority policies thus far has completely lacked definition of important operative terms. At present, all the Commission has provided is the "definition" that

"Minority" means Black, Hispanic, Native American, Alaska Native, Asian and Pacific Islander.

NPRM at n.1. With all due respect, this provides little if any guidance relative to how the Commission might actually implement

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<sup>4/</sup> In his opinion in Metro Broadcasting, Justice Brennan suggested as much when he asserted that the Commission's minority ownership policies were self-limiting because they would no longer be needed "once sufficient diversity has been achieved". 497 U.S. \_\_\_, 67 R.R.2d at 1367. Unfortunately, however, Justice Brennan failed to define "sufficient diversity" or explain how the achievement of such "sufficient diversity" might be determined.

its proposed policies. Virtually all of the categories included in that quoted definition of "minority" are subject to a variety of interpretations. If the Commission is going to engage in race-based policy-making, it should at least be clear what races or ethnicities it is talking about.

8. This is not by any means a frivolous concern. While the term "minority" has not been refined by the Commission in connection with its minority ownership policies, it has been explicated in some greater detail in the area of equal employment opportunity. In particular, FCC Form 395-B (Annual Employment Report) requires the reporting of employment profiles broken out according to racial/ethnic categories which closely parallel the categories encompassed in the term "minority" for ownership purposes.<sup>5/</sup> Presumably, the definitions and distinctions used by the Commission in its evaluation of employment profiles will be the same as those to be used in connection with ownership profiles.

9. But the definitions of the various categories provided in the instructions to FCC Form 395-B are themselves far from clear or consistent. To the contrary, they are in many respects inconsistent and overlapping.

10. According to the instructions to FCC Form 395-B, the term "White, not of Hispanic Origin" is defined as "a person

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<sup>5/</sup> Section V of FCC Form 395-B requires reporting of employment according to the following racial/ethnic categories: "White (not Hispanic)", "Black (not Hispanic)", Hispanic, Asian or Pacific Islander", and American Indian, Alaskan Native".

having origins in any of the original peoples of Europe, North Africa, or the Middle East", while the term "Black, not of Hispanic Origin" is defined as "a person having origins in any of the black racial groups of Africa", and the term "Hispanic" is defined as "a person of Mexican, Puerto Rican, Cuban, Central or South America or other Spanish Culture or origin, regardless of race."

11. As a threshold matter, it would be useful for the Commission to define the term "having origins" as it relates to individual people. That term in and of itself is hardly precise and poses a number of potentially difficult questions concerning the quality and quantity of the "origins" any individual might be said to "have". <sup>6/</sup>

12. Second, is a person who considers himself/herself "Black" excluded from that category if he/she "has origins" in North Africa, as the definition of "White, not of Hispanic Origin" suggests? Is there some anthropological or other objective basis from which a person might ascertain with some degree of certainty what his or her correct categorization is? What about a person of purely Spanish ancestry -- the definition of "White, not of Hispanic Origin" would seem to include such a person (since Spain is a European country), while the definition

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<sup>6/</sup> For example, none of the definitions even begins to hint at how the Commission would treat persons who are the offspring of multi-racial or multi-ethnic marriages or heritages. If a person has one black parent and one white parent, is that person "black"? How about if a person has one black grandparent and three white grandparents? One black greatgrandparent?

of "Hispanic" (which includes persons "of Spanish Culture", but fails to list Spain among the specific source countries listed) might not. What does "of Spanish Culture" mean, anyway -- how does the Commission define that term? Could a person born, say, in Poland, yet claiming to be "of Spanish Culture", qualify as "Hispanic"? See Storer Broadcasting Co., 87 F.C.C.2d 190 (1981). Must the "of Spanish Culture" quality be somehow genetically derived, or could an otherwise non-"Hispanic" person unilaterally make himself or herself to be "of Spanish Culture" through lifestyle, cultural identification, or some other means?

13. And what about a person of Portuguese ancestry -- would he/she be "White, not of Hispanic Origin" (because the person "has origins in . . . Europe"), or rather "Hispanic" (because the person is "of other Spanish Culture"). But see Capital City Community Interests, Inc., FCC 86D-44 (Initial Decision) at 59 (released July 6, 1986) ("Portuguese descent is not the same as Hispanic, and persons of Portuguese descent are not entitled to any minority enhancement credit."). And if Portuguese persons are not "Hispanic", what about South American persons of Portuguese descent?

14. And what basis exists for treating "the Indian Subcontinent" as defining a minority, but not according equivalent treatment to "the Middle East". For that matter, what precise geographic/cultural boundaries does the Commission understand by the terms "Indian Subcontinent", "Middle East", and "North Africa"?



15. And why are persons claiming to belong to the category of "American Indian or Alaskan Native" required, as a prerequisite to qualification for membership in that category, to "maintain cultural identification through tribal affiliation or community recognition", while no other category is subject to such a requirement?

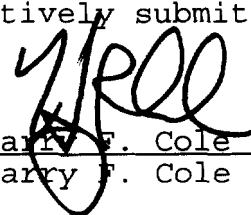
16. All of these questions -- and a range of other similar ones -- focus a more fundamental question here: who exactly is a "minority" entitled to the benefits of the Commission's race-based governmental policies? Is the term "minority" determined by sheer population statistics, or by a history of past discrimination, or by some other formula? Is the term "minority" static or dynamic? For example, if there were to come a time that "White, not of Hispanic Origin" males comprise significantly less than 50% of the population would they be treated as "minorities"? Consideration and careful resolution of these and other similar questions should be completed before the Commission chooses to continue to implement race-based rules and policies.

17. Such policies skate on extremely thin constitutional ice in any event. See U.S. Const., Amend. V, XIV. While some limited race-based (but not gender-based) policies have been affirmed by the Courts, see Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (affirming, 5-4, certain broadcast-related minority ownership policies), Jerome T. Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) (rejecting, 2-1, broadcast-related female ownership policy), such affirmance has been far from

unanimous. The Supreme Court has before it for decision this term (i.e., presumably, prior to July, 1995) a case which could revisit the rationale of the Metro Broadcasting decision. And, to the extent that the Metro Broadcasting decision hinged largely on perceived Congressional approval of race-based preferences, Congress has since rejected such preferences in connection with the Commission's minority tax certificate policy.

18. Before venturing further into the constitutionally troubling area of race- and sex-based policies, the Commission should reassess its basic assumptions and definitions. And even if, after that reassessment, the Commission is still inclined to proceed in the general direction described in the NPRM, before doing so the Commission should first provide itself and the public with a clearer and more adequate justification and a more comprehensible set of operative definitions than it has offered thus far.

Respectively submitted,

  
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